FEB 26 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 890

JOHN MEMOLO,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered January 22, 1946, affirming the judgment of the District Court of the United States for the Middle District of Pennsylvania entered June 19, 1945.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is not reported. The trial court rendered no opinion.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938. The Judgment of the Circuit Court of Appeals for the Third Circuit was filed January 22, 1946, and the mandate was stayed for thirty days from February 6, 1946.

QUESTIONS PRESENTED.

1. Is the defendant in a criminal action deprived of his constitutional rights where the trial judge removes

from the jury panel, for reasons not stated of record, persons not requesting relief from jury duty who are believed by the court or the Government to be favorable to the defense?

2. Has the defendant in a prosecution for income tax evasion been deprived of his constitutional rights where the Government, without his consent, has seized his records, retained them for eight months and failed to return them until ten days before the trial?

3. Has the defendant in such a criminal case been given a fair trial in accordance with his constitutional rights where the trial judge has continually displayed criticism, ridicule and abuse of the defendant's counsel in the presence of the jury.

4. Was it error for the Court to refuse the defense permission to see a record which a Government witness used repeatedly to refresh his recollection which he did not object to showing?

SUMMARY STATEMENT.

This is a prosecution for income tax evasion for the years 1938 and 1939 on an indictment found March 13, 1945, and impounded until April 20, 1945 (1a). The case

was tried before Honorable William F. Smith, specially presiding in the District Court of the United States for the Middle District of Pennsylvania.

Subsequently the Petitioner, along with several others, was indicted upon other charges with Judge Albert W. Johnson, of the District Court of the United States for the Middle District of Pennsylvania. That indictment was returned in September, 1945. After numerous conferences with the United States Attorney with reference to the prosecution of Judge Johnson and two days before the expiration of the Statute of Limitations, this indictment was returned against the Petitioner for income tax evasion, notwithstanding the fact that some time prior thereto he had fully paid his income tax for the years in question.

Upon the occasion of the grand jury investigation of Judge Johnson in September, 1944, the Petitioner's books and records were taken from him without his consent, and were not again returned to him until an order of court required this. The Order was entered May 3, 1945 (3a), and the records were returned to the Petitioner on May 4 and May 5, 1945 (20a). The plea of Not Guilty was entered May 3, 1945, and the trial was held May 15, 1945. A Motion for Bill of Particulars, filed April 26, 1945, was denied on May 3, 1945. Information copied from Petitioner's books and records, was used by the Government as a basis for questioning witnesses at the trial.

The indictment was not opened until April 20, 1945, and the date for trial was not fixed until some time thereafter. The Petitioner made every effort to prepare for trial in the extremely short time allowed, but was unable properly to do so. He filed a motion for continuance of one week on the day of the trial. Notice of this applica-

tion for continuance was given some time in advance as witness the fact the Government filed in opposition an affidavit dated May 14, 1945 (25a). The application was denied, and the trial proceeded through eight days.

One of the exhibits offered in the trial of the case was the Petitioner's testimony taken some months before in the office of the Department of Justice in New York as part of the investigation, presumably of Judge Johnson. In this testimony, the Petitioner was asked whether any of the funds involved ever reached Judge Johnson (185a), and the response was emphatically in the negative. It is the Petitioner's belief that because of this testimony this prosecution for income tax evasion was pressed. Petitioner offers to testify that after the trial, Government counsel Goldschein informed him that if he had testified against Judge Johnson he would not have been prosecuted.

On the day of the trial, and before the trial of the case was actually begun, the court addressed the jury panel of 47 jurors and immediately excused 15, leaving but 32 jurors in the panel. The records in the clerk's office so indicate.

Under the

Act of March 3, 1911, c. 231, Section 287; 36 Stat. 1166; 28 U. S. C. 424,

and the

Act of June 29, 1932, c. 309; 47 Stat. 380; 28 U. S. C. 417a,

the parties are allowed a total of 19 peremptory challenges. When two alternate jurors are chosen, the total is 14 jurors. Thus, to permit 19 challenges in the choice of 14 jurors, a total of 33 persons on the panel is required. There remained in this case only 32 jurors.

The Petitioner particularly objects to the methods employed by the court in excusing jurors. Quite a number of those excused were excused on the court's own motion without any application from the juror. The court was asked by Petitioner's counsel that the names of the jurors excused be put into the record, but the court declined to do so (26a-27a). The court made the statement: "The right of the defendant is to exclude jurors, not the right to select them" (27a; Assignment 740a).

It has since become evident that some of the jurors excluded were those who in another case had reached a decision for the defendant. Undoubtedly the Department of Justice investigated the panel, as it had a right to do. It is the Petitioner's assertion that the court excluded, not only on its own motion but at the instance of the Department of Justice, jurors who were regarded possibly as favorable to the defendant. This was done not in the statutory method, by the exercise of peremptory challenges, but by excluding from the panel such persons. These proceedings are only briefly reported at 26a-29a. Affidavits asserting some of the facts are attached to this Petition. It is the Petitioner's position that the practices indulged in destroyed the fairness of the trial and he offers so to prove.

An examination of the Notes of Testimony of the trial will show that in repeated instances, the trial judge was most critical of the attorney for the defendant, and without cause. The Petitioner's defense was ridiculed, and his attorney abused repeatedly in the presence of the jury. The particulars of these occurrences are given in the Brief filed herewith. Their occurrence was sufficiently frequent and their vigor such as to strongly prejudice any jury against the defendant. It is the Petitioner's position that these practices deprived him of his constitutional right to a fair trial.

In the course of the trial, Government witness, Wade, testified about his previous examination of the Petitioner with relation to income tax matters for the years 1938 and 1939. This examination was stenographically reported, and Mr. Wade used the report repeatedly to refresh his recollection before taking the stand (361a-362a). He then took the stand and purported to testify from memory. When cross examination developed the existence of the stenographic report and of Mr. Wade's reliance upon it counsel for the Petitioner asked to see the stenographic report. At the time there was no objection from the Government (359a). The Court, on its own motion, objected to having the witness produce the stenographic report and refused to permit Petitioner's counsel to see it. These matters are reported beginning at page 359a. The court took the position that counsel for Petitioner could see the report if he would promise, before seeing it, to introduce it in evidence after he got it. Otherwise, the court stated, that Mr. Wade's files were confidential, and the court would not permit him to produce them. Thereafter, Government counsel interposed an objection in support of the position of the court.

Since the witness was, in effect, testifying from recollection of the stenographic report and not from his recollection of the occurrences, it is the position of the Petitioner that he was entitled to examine this stenographic report, and that it was error for the court not to permit this.

All the foregoing matters were made the subject of Assignments of Error.

The jury returned a verdict of guilty, sentence was imposed, and the judgment of the trial court was affirmed in a brief *per curiam* opinion by the Circuit Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE WRIT.

1. The action of the court in dismissing from the panel a substantial number of jurors is a violation of the

Act of March 3, 1911, c. 231, Section 287; 36 Stat. 1166; 28 U. S. C. 424,

and

Act of June 29, 1932, c. 309; 47 Stat. 380; 28 U. S. C. 417a,

2. The action of the court in dismissing from the panel a substantial number of jurors without reason other than possible favor to the defense was a violation of the rights of the Petitioner to a fair trial under the 5th and 6th amendments to the Constitution of the United States.

3. The continued and vigorous opposition of the trial judge to the Petitioner and his counsel in the presence of the jury was such a departure from the requirements of a fair trial as to deprive the Petitioner of his rights under the 5th and 6th amendments to the Constitution of the United States.

4. The refusal of the court, on its own motion, to permit counsel for Petitioner to see the stenographic transcript from which Government witness Wade established his recollection is in conflict with the decision of

Morris v. United States, 149 Fed. 123 (1907) C. C. A. 5.,

decided by the Circuit Court of Appeals for the Fifth Circuit.

WHEREFORE, the Petitioner submits herewith his Brief in support of his contentions, together with certain affidavits to establish the action of the court with respect to the jury panel, and prays that this Court grant a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

JOHN MEMOLO,
Petitioner.

ROBERT T. MCCRACKEN,
STANLEY F. COAR,
C. RUSSELL PHILLIPS,
Attorneys for Petitioner.

1421 Chestnut Street,
Philadelphia, Pa.

AFFIDAVITS IN SUPPORT OF ALLEGATIONS IN THE PETITION.

STATE OF PENNSYLVANIA }
COUNTY OF LACKAWANNA } *ss.*

ROBERT A. HULL, being duly sworn, deposes and says that the facts hereinafter set forth are true and correct: That he was drawn to serve as a Petit juror in the United States District Court in and for the Middle District of Pennsylvania to March Term, 1945; that he appeared for jury duty at the United States District Court Room in the Federal Building at Scranton, Pennsylvania, as designated on May 15, 1945, and that the case of the Government *vs.* John Memolo was called; that he was excused by Judge William F. Smith of the District Court of New Jersey, specially presiding, although no request for such excuse had been made.

(Signed) ROBERT A. HULL.

Sworn and subscribed to before me this 13th day of February, 1946.

(Signed) MARY TELL EVANS,
Notary Public.

[SEAL]

My commission expires Feb. 23, 1949.

MIDDLE DISTRICT OF PENNSYLVANIA }
STATE OF PENNSYLVANIA } *ss.*
COUNTY OF LACKAWANNA }

MAUDE C. MILLER being duly sworn according to law deposes and says:

I am a resident of the Borough of Forty-Fort, Luzerne County, Pennsylvania; I was notified to appear to

serve on the jury in the United States District Court for the Middle District of Pennsylvania at Scranton, Pennsylvania, in April of 1945; I reported at the Court House and in the month of April I was selected to serve as a juror in the case of the Government *vs.* Arthur A. Maskery; the jury could not agree on a verdict and so reported to the court, and the jury was discharged; the jury stood eight for conviction and four for acquittal, and I was one of the four jurors for acquittal; I was again notified to be present to act as a juror in Scranton, at the same court, and reported on the 15th day of May 1945; while I was in the court room, the case of the Government against John Memolo was called for trial; I was then excused by the Honorable William F. Smith, the Judge, as a juror, without making any request to be excused; after I was excused, I asked Judge Smith if the fact that I carried a cane was the reason for my being excused, and I stated to Judge Smith that my carrying a cane was the result of an operation which I had had on one of my legs over twenty-five years before, and that I was not incapacitated in any way; that I drove my own car and that I danced, and that it would be in no way a hardship for me to serve as a juror, and that I had served in the month of April on the Maskery case in the same court, and had remained out with the jury all night because the jury could not agree, and that I was one of four jurors who were for acquittal of the defendant, Maskery; I asked Judge Smith if he would re-instate me as a juror when the other jurors were called back, and he said he would.

MAUDE C. MILLER.

Sworn and subscribed to before me, this 14th day of February, A. D. 1946.

MARIE H. KELLY,
Notary Public.

[SEAL]

My commission expires Jan. 19, 1947.

STATE OF PENNSYLVANIA }
COUNTY OF LACKAWANNA } *ss.*

On this 12th day of February, 1946, personally appeared B. J. Biesecker, resident of Moscow, Lackawanna County, Pennsylvania, who, being duly sworn according to law, deposes and says that he was a member of the panel of jurors summoned for service to the March Term, 1945, United States District Court, Middle District of Pennsylvania; that he was called and served on the jury in the case of United States *v.* Arthur A. Maskery, *et al.*, No. 11,307 Criminal Docket, which went to trial on or about April 11, 1945 and terminated April 25, 1945 by disagreement of the jury; that the jury in said case stood eight for conviction and four for acquittal; that he was one of the four jurors which stood for acquittal, whereupon the said jury was discharged; that subsequently he was notified to appear for service on May 15, 1945, at which time he appeared, and there was called for trial the case of United States *v.* John Memolo; that the Hon. William F. Smith, District Judge, Specially presiding at said trial of John Memolo in the Middle District of Pennsylvania, dismissed the said B. J. Biesecker from jury service without any request by the said B. J. Biesecker, and without any reason being assigned for such dismissal.

B. J. BIESECKER.

Sworn to and subscribed before me this 13th day of February, 1946.

MARY E. GALLAGHER,
Notary Public.

[SEAL]

My Commission Expires Feb. 23, 1949.

STATE OF PENNSYLVANIA }
COUNTY OF LACKAWANNA } *ss.*

PETER J. ROSAR, being duly sworn according to law, deposes and says that he is a resident of the City of Scranton, County of Lackawanna, State of Pennsylvania, and a retired Ex-Chief of the Fire Department of the said City; that he was summoned as a juror for the March Term, 1945 and was called for service May 15, 1945 at which time he appeared in the District Court of the United States for the Middle District of Pennsylvania, being then and there held on the said 15th day of May, 1945; that there was called for trial the case of United States versus John Memolo; that without any request or prior information he was discharged as a juror by the Honorable William F. Smith, District Judge, United States District Court of New Jersey, Specially Presiding in the Middle District of Pennsylvania; that he thereupon inquired of Judge Smith the reason for his discharge, and the following conversation substantially took place between him and Judge Smith: I asked the Judge why I was discharged from the jury, had I done any wrong or was there anything against my character. He said no, wait a minute. I waited, he got a sheet up from the District Attorney's table, and he said, what is your name again? I was introduced to him first. I said, Peter Rosar, Peter J. Rosar. He said, yes, you are an Ex-City Official. I said, no sir, he said according to this list, you are an Ex-City Official. That don't make me a City Official. A City Official in my opinion in our City is a member of the Mayor's Cabinet, the Fire Chief is not, nor the Chief of Police either. Well, he said that is what they have you rated here as, an Ex-City Official, but still and all the Judge has the right to take people off. I said, well I am just curious to know if there is any reason. I always bore a good reputation in this town, if I have done any wrong I want to know, I don't believe I have an enemy

in the world that I know of. We have a right to dismiss anybody we want, otherwise there is nothing against you.

PETER J. ROSAR.

Sworn to and subscribed before me this 19th day of February, 1946.

MARY E. GALLAGHER,
Notary Public.

[SEAL]

My Commission expires February 23, 1949.

STATE OF PENNSYLVANIA }
COUNTY OF LUZERNE } *ss.*

I, Mary W. Schwartz, of 113 E. Green Street, Nanticoke, Pennsylvania, being duly sworn according to law, depose and say:

(1) That I was summoned for jury duty in the United States District Court, sitting at Scranton, Pennsylvania, during April of 1945, which is the first time I have been called for jury duty in any court.

(2) That when the case of the government against John Memolo was called and before the selection of the jury began, the following occurred: Presiding Judge Smith called out my name in the court-room and said: "You are the wife of the District Attorney of Luzerne County." I answered affirmatively. He then said: "The wife of a prosecuting officer is apt to be prosecution-minded. You are excused from further attendance."

(3) My name was not thereafter called.

MARY W. SCHWARTZ.

Sworn and subscribed to before me this 20 day of February, 1946.

ANTHONY DOBKOWSKI,
Notary Public.

[SEAL]

My Commission Expires Mar. 12, 1947.

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

JOHN MEMOLO, being duly sworn according to law, deposes and says that he is a resident of the Township of Madison, County of Lackawanna, State of Pennsylvania, in the Middle District of Pennsylvania, defendant in the Criminal Proceedings to No. 11319, March Term, 1945, United States District Court, Middle District of Pennsylvania; that since the trial of the said case which began on May 15th, 1945 and continued to May 23rd, 1945, he has interviewed jurors who were empanelled as the Petit Jury at said March Term, 1945, at which time the case against him was the only case for trial; that he has examined the record in the Office of the Clerk of the said District Court, which record discloses that 47 jurors were recalled for service on May 15, 1945; that of the said number, 12 were chosen as trial jurors, 2 were chosen as alternates, 10 were peremptorily challenged by the defendant as jurors and 1 additional challenge on the selection of an alternate juror; that the Government challenged 6 as jurors and an additional challenge of 1 alternate juror; that 4 jurors were excused by request; that 11 jurors were excused without request.

1. B. J. Biesecker was excused without any request on his part although he had been a juror at the same term in the case of United States versus Arthur A. Maskery, *et al.*, tried in the same District Court, and was one of four who voted for acquittal, resulting in a disagreement of the said jury and its discharge, his affidavit is furnished herewith.

2. Robert Hull, a juror summoned on said 15th day of May, 1945, is a Trust Officer and Vice President of Scranton Lackawanna Trust Company; that he was excused without request on his part with the comment by the Court substantially that as Mr. Hull was a lawyer and, as such, naturally inclined to uphold the law, that he would be excused. His affidavit is furnished herewith.

3. Mrs. Maude C. Miller was also a juror who had served at the same term in the case of United States versus Arthur A. Maskery, and was one of the four jurors who had voted for the acquittal of the defendant, Maskery; that she was excused from service in the case of United States versus John Memolo without any reason being assigned therefor; that when her name was announced as having been excused, she interviewed the Honorable William F. Smith and asked him if the reason for her being excused was because she carried a cane, or was not physically able to serve as a juror, and explained to him that carrying a cane was the result of an operation some twenty-five years ago, and that she was not incapacitated in any way; that she drove her own car, danced and serving on the jury was not a hardship as she had served in the month of April in the Maskery case in the same Court, and inquired if she would be reinstated as a juror after the selection of the jury for the trial of the case of United States versus John Memolo, and was told that she would be reinstated.

4. Mrs. Mary Schwartz, a juror also summoned and present on the said 15th day of May, 1945, was excused without any request on her part; that a colloquy ensued between her and the said Honorable William F. Smith, the substance of which is that having asked the juror what her occupation was and what her husband's occupation was, she reported that he was District Attorney of Luzerne County, one of the counties part of the Middle District of Pennsylvania. He thereupon excused her and said that as the wife of the District Attorney, she ought to be excused.

5. Peter J. Rosar was a juror summoned at the said term of court and at the time of the trial of the said case United States versus John Memolo; that without any request on his part he was excused from jury service; that he inquired of the said Honorable William F. Smith the reason for his being excused as a juror and wanted

to know for what reason, if any, he was disqualified, and when asked by Judge Smith what his occupation was he said he was a retired Ex-Chief of the Fire Department of the City of Scranton. He was thereupon told that he would be excused as the Court could dismiss a juror. His affidavit is furnished herewith.

6. Frank C. Ackley, retired Postmaster of Wyalusing, Bradford County, was discharged without request and without any reason being assigned for discharge from the said jury.

7. Ray C. Snyder, resident of Clarks Summit, Lackawanna County, in said Middle District was discharged without request and without any reason being assigned for such discharge as a juror on said 15th day of May, 1945.

The affiant further avers, deposes and says that he examined the record and the transcript of testimony; that upon request by his counsel as to why jurors were excused from service, the Court refused to set forth any reason, as appears by an examination of the transcript of testimony, with the exception of 3 jurors who were excused on their own application; that this affiant has not been able to interview all the other jurors who were excused and interrogate them as yet; that hereto attached is a copy of the Clerk's list of jurors summoned and recalled for service on May 15th at the time set for the trial of the case of United States versus John Memolo, no other case being set for trial at said recalled term.

The affiant is about to file in the Supreme Court of the United States petition for certiorari in the case of John Memolo versus United States, and hereby offers to prove all of the matters set forth in this affidavit and in that petition.

_____

(John Memolo)

Sworn to and subscribed before me this 26th day of February, 1946.

AMELIA H. SYREN
NOTARY PUBLIC
My Commission Expires January 2, 1949

PETIT JURORS, MARCH TERM, 1945, RECALLED FOR SERVICE MAY 15, 1945.

Name	*Occupation*	*Address*	*County*
Ackley, Frank G.	Retired	Wyalusing	Bradford
Brown, Mrs. Mattie	Housewife	Scranton	Lackawanna
Biesecker, B. J.	Laborer	Moscow	Lackawanna
Barnatovech, John	Real Estate	Taylor	Lackawanna
Butler, Mrs. Marie C.	Housewife	Forty-fort	Luzerne
Bremenski, Mrs. Josephine	Housewife	Swoyerville	Luzerne
Cobleth, Charles	Retired	Nicholson	Wyoming
Crosby, Mrs. Mary	Housewife	Noxen	Wyoming
Conrad, Mrs. Elizabeth	Housewife	Scranton	Lackawanna
Clark, M. J.	Representative	Pittston	Luzerne
Cole, Mrs. Louise	Housewife	Clark Summit	Lackawanna
Ellsworth, Edward	Retired	Kingston	Luzerne
England, Mrs. Dorothy	Housewife	Scranton	Lackawanna
Frantz, Fred	Real Estate	Clark Summit	Lackawanna
Fries, Arthur	Farmer	Aldenville	Wayne
Fuller, James H.	Retired Teacher	Scranton	Lackawanna
Grimes, Mrs. Faith	Housewife	Wilkes-Barre	Luzerne
Hartman, Frank J.	Retired	Wilkes-Barre	Luzerne
Healey, Mrs. Janet	Housewife	Waverly	Lackawanna
Hull, Robert	Trust Officer	Waverly	Lackawanna
Hudak, Pauline C.	Housewife	Wilkes-Barre	Luzerne
Hodgson, William A.	Farmer	Factoryville RD	Wyoming
Hibye, Miss Madeline	Clerk	Scranton	Lackawanna
Jackson, Jessie	Housewife	Scranton	Lackawanna
Jackson, Mrs. Mabel	Housewife	Wilkes-Barre	Luzerne
Lee, Ivy	Housewife	Scranton	Lackawanna
Mainwaring, Mrs. H. W.	Housewife	Forty-fort	Luzerne
Manley, Mrs. Anne Pitchford	Housewife	Scranton	Lackawanna
Matthews, Mrs. Jessie	Housewife	Wilkes-Barre	Luzerne
Miller, Mrs. Maude C.	Housewife	Forty-fort	Luzerne
Niemeyer, Miss Clare	Retired	Scranton	Lackawanna
Neville, Miss Emma	Clerk	Sterling	Wayne
Oman, Mrs. Sarah	Housewife	Scranton	Lackawanna
Peck, Mrs. Jane	Housewife	Waverly	Lackawanna
Roderick, Mrs. Eleanor	Housewife	Wilkes-Barre	Luzerne
Rosar, Peter J.	Inspector	Scranton	Lackawanna
Snyder, Ray C.	Retired	Clark Summit	Lackawanna
Scott, George	Insurance	Scranton	Lackawanna
Schwartz, Mrs. Mary	Housewife	Nanticoke	Luzerne
Sperling, Harry	Merchant	Wilkes-Barre	Luzerne
Thompson, Elias	Retired	Factoryville	Wyoming
Whalen, Mrs. Mary	Housewife	Scranton	Lackawanna
Williams, Mrs. J.	Housewife	Kingston	Luzerne
Williams, T. S.	Supervisor	Luzerne	Luzerne
Wilson, Dr. John	Physician	Factoryville	Wyoming
Wirth, William	Salesman	Scranton	Lackawanna
Yetter, Stanley	Insurance	Wilkes-Barre	Luzerne

Certified from the Record
Date: Feb. 20, 1946
[COURT SEAL] R. G. LOHMANN, Clerk
HEETOS J. JOHNS, Deputy Clerk